

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PEDRO ROSSELLO; LUIS FORTUÑO; * CIVIL NO. 2004-2251(DRD)
ET AL. *

Plaintiffs, *

v. *

SILA CALDERON, individually and in *
her capacity as Governor of Puerto *
Rico; ANIBAL ACEVEDO-VILA, ET AL. *

Defendants. *

AMENDED ORDER

Pending before the court is a request from the Electoral Commission that the court should proceed as to the recount ordered by this court in a way that would allow the counting and the **adjudication** of the split ballots in question under the jurisdiction of the court, that is, one mark over a party and two additional marks and/or one mark over the party and two write in entire and/or any other similar combination of three "X"s.

First, **adjudicating** votes creates an expectancy of certainty to the people which this court cannot provide precisely because the legality of the split ballots is under federal scrutiny. Precisely, when the legality is at issue the court should **not** " . . . count first and rule upon legality afterwards." George Bush v. Albert Gore, 531 U.S. 1046, 121 S. Ct. 512 (Dec. 9 2000). The reasoning behind this federal solution is that "count first and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." The concurring opinion of Justice Scalia is part of the majority opinion of the court granting a stay of the counting of votes in the Florida election. Under this mandate this federal court should not even count the votes. This court however permits the counting but not the **adjudication** precisely because in our system the adjudication is when "irreparable harm. . . to the country [occurs]." Bush v. Gore, Id.

(Concurring opinion Justice Scalia as to the stay of counting of the Florida's votes). The solution of this matter is consonant with this court's restraint as to case and controversy to determine whether or not the challenged ballots affect the election.

Further, the court has some concern in authorizing the adjudication of said ballots since the court may accidentally lose jurisdiction and/or may lead to a solution under local law that may create a further friction with our friends at the Supreme Court of Puerto Rico. The court explains.

It is not an impossibility that an elector not belonging to any party, or not belonging to the PPD party, based upon the **adjudication** of the votes files a complaint in local court as was done in the case of Manuel R. Suárez Jiménez v. Comisión Estatal de Elecciones, KAC 04-3568 (filed on November 16, 2004 at 1:55 p.m.) and eventually obtain from the Supreme Court a remedy ordering a certification of the election based on the "adjudicated" ballots within five days of the filing of the original complaint at trial level (Supreme Court decision was issued in the case on November 20, 2004, sometime after 4:16 p.m. when the last filing was made by Plaintiff Manuel R. Suárez alleging that the removal was frivolous.)¹

Further, the local Supreme Court has issued an Order in its judgment section ordering that all "mixed ballots be counted and adjudicated." (Manuel R. (Manny) Suárez v. Comisión Estatal de Elecciones, at 2004-004 (Certification)). Hence, if this District Court authorizes the adjudication and the counting it is not an impossibility that a potential plaintiff may file a complaint in local court and under local court again and within four days obtain a certification and a decision from the Supreme Court to certify a winner under local law leading again to a friction between jurisdictions.

Hence, because the fact that "adjudicating" prematurely the questioned ballots may cause a wrongful expectancy in the public and "irreparable harm . . . to the public", Bush

¹ The allegations of the removed complaint at § 26 makes allegations of equal protection of laws without clarifying if they are under the local or the federal constitution.

v. Gore, Id., because the court is concerned in accidentally losing its jurisdiction by an adjudication of votes leading to a certification, under the Rules and Regulations of the Electoral Commission for the 2004 Election, § 125, and because there is no guarantee that a third party not covered by the orders of this court file a complaint in local court to certify a winner based on “adjudicated” ballots and obtain a remedy of certification, this court **ORDERS** that the recount procedure be performed by counting the split ballots, segregating the same, **but not adjudicating the ballots**. The Commission is **ORDERED NOT TO PRODUCE** any certification whatsoever until this court renders a final decision as to its jurisdiction under the split ballots object of this complaint.

Any pronouncement by the Supreme Court to the contrary in the case of Manuel R. (Manny) Suárez is hereby **ANNULLED** pursuant to the automatic stay provisions contained in the Federal Removal Statute, 28. U.S.C. 1446(d), “the state court shall proceed no further unless and until the case is remanded.” Hyde Park Partners L.P. v. Connolly, 839 F.2d 837 ((1st Cir.1988). Since 1882, more than two hundred and twenty years ago the Supreme Court stated in Steamship Co. v. Tugman, 106 U.S. 112, 122, 1 S.Ct. 58, 60 (1882), that at the moment the removal is affected the jurisdiction of the state court “absolutely ceased and that the jurisdiction of [federal court] immediately attached.” Further. . . “[t]he Temporary Stay Order issued by the Superior States Court [is] void ab initio.” Hyde Park Partners L.P. v. Connolly, 839 F.2d 837. Moreover, the state court had a “duty to proceed no further in the case. Any order thereafter made in that court was **coram non judice**, unless its jurisdiction was restored.” Tugman, 106 S. Ct. ar 122, 7 S. Ct. 60. “**This is so even if eventually [it] is determined that removal is improper.**” Id. (Emphasis ours.) This last Supreme Court mandate clearly dictates that potential vices in removal are to be determined by the federal court. The above doctrines were identically reiterated in the case of Sweeney v. Resolution Trust Corporation, 16 F. 3d 1, 4 (1st Cir. 2001). Finally, the doctrines of removal from the Supreme Court are applicable to the

Supreme Court of Puerto Rico. Volkswagen de P.R. v. P.R. Labor Relations Board, 454 F.2d 38, 42 (1st Cir. 1972) (removal of an appealed case from an agency removed directly from the Supreme Court) reiterated at Carmen M. Hernández v. Commonwealth of P.R., 30 F..Supp. 205, 211 (D.C.P.R. 1998).²

The Commission and Party Commissioners shall proceed in accordance with this order.

IT IS SO ORDERED.

At San Juan, Puerto Rico, this 23 day of November 2004.

s/ Daniel R. Domínguez
DANIEL R. DOMINGUEZ
U.S. DISTRICT JUDGE

²

The court shall issue a further Opinion and Order as to the propriety of the local Supreme Court issuing an Opinion and Order notwithstanding a prior notice of removal in the case of Manuel R. (Manny) Suárez v. Comisión Estatal de Elecciones, KAC 04-3568.